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No. 90-357

In the Supreme Court of the United States

OCTOBER TERM, 1990

PETER D. PETERSON, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 203(b) of the Reclamation Reform Act of 1982, which requires that water users pay the United States the "full cost" for irrigation water assignable to lands leased in excess of a landholding of 160 acres and located within a water district that has not entered into a contract amendment incorporating the discretionary provisions of the Act, violates petitioners' rights under the Due Process Clause of the United States Constitution.

2. Whether Section 203(b) effects an uncompensated taking of petitioners' property in violation of the Fifth Amendment of the United States Constitution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A38) is reported at 899 F.2d 799. The findings of fact and conclusions of law of the district court (Pet. App. E1-E15) are not reported.

JURISDICTION

The decision of the court of appeals was entered on March 14, 1990, and amended on May 11, 1990. A petition for rehearing was denied on May 31, 1990 (Pet. App. D1). The petition for a writ of certiorari was filed on August 29, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Reclamation Reform Act of 1982, 43 U.S.C. 390aa *et seq.*, revised the federal reclamation laws, including the provisions limiting the size of landholdings receiving reclamation water and the pricing of such water. Water districts that had already entered into contracts with the government for the purchase of federal project water were not required to amend their existing contracts to conform with those provisions of the new statute. Section 203(b) of the Act provides, however, that where a water district does not, within four and one-half years after the passage of the Act, execute an amendment of its contract to incorporate the new provisions, "irrigation water may be delivered to lands leased in excess of a landholding of one hundred and sixty acres only if full cost * * * is paid for such water as is assignable to those lands leased in excess of such landholding of one hundred and sixty acres." 43 U.S.C. 390cc(b). Petitioners contend that Section 203(b) violates due process and effects an uncompensated taking of their property.

1. The Reclamation Act of 1902, ch. 1093, 32 Stat. 388, created a federal program to encourage settlement of the West through the provision of irrigation water for arid lands. Congress specifically wished to encourage the establishment of modest sized family farms owned and operated by families that resided upon them. See, *e.g.*, 35 Cong. Rec. 1383, 6734 (1902). To achieve that goal, Congress limited the potential beneficiaries of the program and the size of the subsidy that they could receive.

Section 1 of the Act created a reclamation fund to be used "in the examination and survey for and the construction and maintenance of irrigation works for

the storage, diversion, and development of waters for the reclamation of arid and semiarid lands" in the western states. 43 U.S.C. 391. Section 2 authorized the Secretary of the Interior to carry out the activities described in Section 1. 43 U.S.C. 411. Section 4 empowered the Secretary, among other things, to determine the charges to be paid by the water users, such charges to be fixed "with a view of returning to the reclamation fund the estimated cost of construction of the project." 43 U.S.C. 461. The Act, however, did not provide for the return of interest on the government's construction costs.

Section 5 of the Act directly implemented Congress's intent to promote family farms, to spread widely the benefits of the reclamation program, and to prevent speculation. See H.R. Rep. No. 458, 97th Cong., 2d Sess. 8 (1982) (Pet. App. H1-H2). That provision states in relevant part:

> No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefore are made.

43 U.S.C. 431. Section 10 of the Act authorized the Secretary of the Interior "to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying out the provisions of this Act into full force and effect." 43 U.S.C. 373.

Congress subsequently modified the reclamation program created by the 1902 Act through the Recla-

mation Extension Act of 1914, ch. 247, 38 Stat. 686. Section 5 of that statute provided that, in addition to the construction charge, project participants would also be required to pay an operation and maintenance charge based upon the total cost of operation and maintenance of the project, or particular project units. 43 U.S.C. 492.[1] Thereafter, Congress enacted the Omnibus Adjustment Act of May 25, 1926, ch. 383, 44 Stat. 636. Section 46 of the 1926 Act generally provided that no water shall be delivered from any new federal reclamation project unless the Secretary of the Interior has entered into a contract with an irrigation district or districts organized under state law, which contract shall provide for payment by the district or districts of the cost of constructing, operating, and maintaining the project works. 43 U.S.C. 423e.[2] Section 46 further stated that such contracts shall provide:

> that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute

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[1] Under Section 6 of the 1902 Act, operation and maintenance costs had been paid from the Reclamation Fund until such time as the construction charges for the major portion of the lands within the project were paid. 43 U.S.C. 491, 498. See 32 Stat. 389.

[2] Prior to 1926, the Secretary of the Interior had entered into contracts directly with the individual water users.

> valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior * * *.

43 U.S.C. 423e.

Congress revisited the reclamation program in the Reclamation Project Act of 1939, ch. 418, 53 Stat. 1187, 43 U.S.C. 485 *et seq.* Section 9(e) of the 1939 Act authorizes the Secretary to enter into either long- or short-term contracts to furnish water for irrigation purposes. 43 U.S.C. 485h(e). Such water service contracts shall be for periods not to exceed 40 years and "at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper." 43 U.S.C. 485h(e).

2. By 1979, the federal reclamation program was fully or partially supplying or supplementing the irrigation water supply to more than 6 million acres in 214 operating reclamation projects. S. Rep. No. 373, 97th Cong., 2d Sess. 8 (1982) (Pet. App. H43). The largest of these projects is the Central Valley Project (CVP), which was undertaken by the federal government upon the request of the State of California. See *Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U.S. 275, 280-283 (1958). In addition, the United States has also constructed, and provides irrigation water from, the Solano Reclamation Project in California. The Secretary has entered into long-term contracts with various water districts in the Central Valley and Solano areas for the delivery of irrigation water. The contracts, which state that they are

being executed pursuant to the federal reclamation laws (Pet. App. J3), are usually for a 40-year period and generally provide that the United States will deliver a specified amount of water (*id.* at J6). The price of water is generally set at a maximum dollars and cents price per delivered acre-foot of water for the duration of the contract. *Id.* at J9.

The contracts also include provisions intended to implement the excess land requirements. The contracts provide that the districts agree not to furnish water to any excess lands unless the owners have executed valid recordable contracts for the sale of such lands under the terms and conditions set out in the contract. Pet. App. J21-J22. The term "excess land" is generally defined to mean "that part of the irrigable land within the District in excess of one hundred and sixty (160) acres held in the beneficial ownership of any private individual, whether a natural person or a corporation." *Id.* at J24. The contracts further provide that if Congress repeals the excess land provisions of the reclamation law, the contract articles concerning excess land will no longer be in effect and if Congress amends the excess land provisions or other provisions of the reclamation laws, "the United States agrees, at the option of the District, to negotiate amendments of appropriate articles of this contract, all consistently with the provisions of such repeal or amendment." *Id.* at J26. The CVP and Solano contracts contain no mention of leased lands.

3. By 1982, a number of circumstances had brought increased attention to the federal reclamation program and led Congress to reconsider that program. First, the agricultural segment of the economy had changed vastly since the turn of the century. Many commenters asserted that, as a result of such

changes, the 160-acre land ownership limit established in the original 1902 Act "is not viable in today's economy and that it must be increased to provide a decent standard of living for reclamation land farmers." S. Rep. No. 373, *supra*, at 9 (Pet. App. H45). Second, because the purchase price of water from federal reclamation districts did not include any element of interest on the costs that the federal government incurred in constructing the project, such irrigation water is, in effect, subsidized by interest-free loans. See *Ivanhoe*, 357 U.S. at 295.[3] As the generally prevailing interest rates increased, the magnitude of the interest subsidy increased as well. Indeed, where long-term-fixed price contracts for the sale of federal irrigation water are in effect, such as in the CVP, the rates charged under such contracts were often no longer sufficient to pay even the operation and maintenance costs. Pet. App. E5.

The increasing extent of the federal subsidy, in turn, brought heightened concern that it be equitably spread to the maximum number of beneficiaries. See, *e.g.*, Trelease, *Reclamation Water Rights*, 32 Rocky Mtn. (U. Colo.) L. Rev. 464, 491 (1960). It often appeared, however, that Congress's original goal of achieving the widest possible distribution of reclamation benefits was being frustrated. In particular, the excess land ownership provisions were being circumvented by the use of a variety of multiple ownership and lease arrangements. See 128 Cong.

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[3] In addition, Section 9(e) of the Reclamation Project Act does not require that the payments under contracts for sale of irrigation water fully return all of the allocated project construction costs. See 43 U.S.C. 485h(e). In the case of the CVP, it was recognized from the outset that the government would subsidize most of the allocated construction costs. See *City of Fresno* v. *California*, 372 U.S. 627, 631 (1963).

Rec. 16,297 (Sen. Lugar) (1982); *id.* at 26,076 (Rep. Miller). The Department of the Interior had never regulated the amount of eligible lands leased by any one landowner or operator and, consequently, it became possible for a single landowner or corporation to farm up to several thousand acres with subsidized water. In 1982, it appeared that three percent of the farming operations receiving reclamation benefits accounted for control of 30% of all of the irrigated lands in the program. *Ibid.* (Rep. Miller).

4. The Reclamation Reform Act of 1982 was enacted to provide, among other things, "a modern policy expression regarding Federal reclamation law." S. Rep. No. 373, *supra*, at 11 (Pet. App. H48). Several provisions of the Act are pertinent here. First, Section 204 provides that irrigation water may not be delivered to a "qualified recipient" for use in the irrigation of lands owned by such a recipient in excess of 960 acres. 43 U.S.C. 390dd. A "qualified recipient" is an individual citizen or resident alien or a legal entity that benefits 25 natural persons or less. 43 U.S.C. 390bb(9). A "limited recipient," which is any legal entity benefiting more than 25 natural persons (43 U.S.C. 390bb(7)), is subject to stricter limitations.

Second, Section 205(a) states that, notwithstanding any other provision of law, any contract with a district entered into by the Secretary shall provide for the delivery of irrigation water, in the case of a qualified recipient, at "full cost" to a "landholding" in excess of 960 acres for a qualified recipient. 43 U.S.C. 390ee(a). The term "full cost" is defined to include an interest element on construction costs as well as operation and maintenance deficits. 43 U.S.C. 390bb(3)(A). "Landholding" is defined as the "total irrigable acreage of one or more tracts of land situ-

ated in one or more districts *owned or operated under a lease* which is served with irrigation water pursuant to a contract with the Secretary." 43 U.S.C. 390bb(6) (emphasis added).[4]

Finally, Section 203 addresses the applicability of the various Reclamation Reform Act provisions to new, amended, and existing contracts. See 43 U.S.C. 390cc. Among other things, Section 203(b) makes Sections 209 through 230 of the Act applicable to all existing contracts.[5] Section 203(b) further provides that where an irrigation district does not within four and one-half years enter into a contract amendment incorporating all of the provisions of the RRA (including Sections 204 through 208), irrigation water may be delivered within the district to lands leased in excess of a landholding of 160 acres only if "full cost" is paid for such water.[6]

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[4] Section 205(b) states that contracts for the sale of irrigation water shall provide for the delivery of such water to lands not in excess of the "landholding" acreage limitations established in Section 205(a) upon terms and conditions under prior existing reclamation law. 43 U.S.C. 390ee(b). Section 208(b) further provides, however, that the price must be sufficient to cover the operations and maintenance charges as calculated by the Secretary and that the Secretary "shall modify the price of irrigation water delivered under the contract as necessary to reflect any changes in such costs by amending the district's contract accordingly." 43 U.S.C. 390hh(b).

[5] Hence, Sections 209 through 230 are sometimes referred to as the "mandatory" provisions of the Act, while Sections 204 through 208 (which include the limitation on ownership, pricing, and operation and maintenance charges provisions) are referred to as the "discretionary" provisions of the statute.

[6] Section 203(b) states in full:

> Any district which has an existing contract with the Secretary as of [the date of enactment of this Act] which

Thus, where a contract that incorporates Sections 204 through 208 of the RRA is in effect, a qualified recipient may own up to 960 acres of irrigable lands, and, where the lands owned or leased do not exceed 960 irrigable acres, the prices paid for federal project irrigation water will not reflect any element of interest upon the government's project construction costs. The price will remain subject, however, to periodic readjustment so as to assure reimbursement of Interior's project operation and maintenance costs. In addition, a project beneficiary may receive irrigation water for an unlimited amount of leased lands for landholdings that exceed 960 acres, but the government must then be reimbursed for the water assignable to the lands in excess of 960 acres at a "full cost" rate that includes an element of interest upon the allocated construction costs.[7]

> does not enter into an amendment of such contract as specified in subsection (a) of this section shall be subject to Federal reclamation law in effect immediately prior to [the date of enactment of this Act,] as that law is amended or supplemented by sections 209 through 230 of this title. Within a district that does not enter into an amendment of its contract with the Secretary within four and one-half years of [the date of enactment of this Act,] irrigation water may be delivered to lands leased in excess of a landholding of one hundred and sixty acres only if full cost, as defined in section 390bb(3)(A) of this title, is paid for such water as is assignable to those lands leased in excess of such landholding of one hundred and sixty acres: *Provided*, That the interest rate used in computing full cost under this subsection shall be the same as provided in section 390ee(a)(3).

43 U.S.C. 390cc(b).

[7] The 960-acre figure applies to a qualified recipient. The corresponding figure for a limited recipient receiving irrigation water on or before October 1, 1981, is 320 acres. A

Where no amendment incorporating Sections 204 through 208 of the Reclamation Reform Act is executed, the government will continue to furnish irrigation water for use on operations not exceeding 160 acres at the price specified in the pre-1982 contracts, notwithstanding that the price may be insufficient to cover even the government's operation and maintenance expenses.[8] Similarly, Section 203(b) does not affect deliveries of irrigation water at the fixed contract price to all lands, including those in excess of 160 acres, *owned* by a landowner who has executed recordable contracts obligating him to divest himself of irrigable land in excess of 160 acres. Under Section 203(b), however, irrigation water may be delivered to lands *leased* in excess of a landholding of 160 acres only if "full cost" is paid for the water assignable to such leased lands.

5. Petitioners here are water districts, individual water users, and representatives of entities that receive irrigation water from the Central Valley and Solano Projects pursuant to water service contracts executed prior to the enactment of the Reclamation Reform Act. Petitioners initiated six suits in federal district court against the United States, the Department of the Interior, the Secretary of the Interior, and subordinate federal officials. The complaints alleged that the provisions of the Reclamation Reform Act requiring that water users pay "full cost" for

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limited recipient that was not receiving water on that date must pay "full cost" for the entire landholding. 43 U.S.C. 390ee(a).

[8] Entities within irrigation districts which have not entered into such contract amendments may nonetheless elect to bring themselves under all of the provisions of the RRA. Section 203(c), 43 U.S.C. 390cc(c).

irrigation water assignable to leased lands in excess of 160 acres and located within irrigation districts that do not adopt the specified contract amendments violate the Due Process Clause of the Fifth Amendment or, alternatively, violate the Takings Clause of the Fifth Amendment. The Natural Resources Defense Council intervened in the cases as a defendant. Pet. App. A5-A6, E1-E2.

The district court entered findings of fact and conclusions of law granting respondents' motions for summary judgment. Pet. App. E1-E15. Finding that "[t]he important social, political and ecological goals inherent in the legislation fully justify its enactment and any economic benefits to the United States which might result as a consequence of the legislation are merely incidental," the court ruled that the Reclamation Reform Act does not offend the Due Process Clause of the Fifth Amendment. *Id.* at E13. The court further concluded that the plaintiffs had failed to demonstrate an uncompensated taking of their property rights in violation of the Takings Clause of the Fifth Amendment. *Id.* at E13-E14.

6. The court of appeals affirmed. Pet. App. A1-A38. Stating that "[t]he first step in both due process and taking analysis is to determine whether there is a property right that is protected by the Constitution" (*id.* at A20-A21), the court reviewed the water districts' contracts with the United States to determine whether petitioners "have a constitutionally protected property interest in the delivery of subsidized water to leased tracts of any size" (*id.* at A21).

The court of appeals determined that petitioners do not have any such constitutionally protected right. The court gave several reasons for that conclusion.

First, the court found that although the federal reclamation laws do not expressly reserve a congressional right to amend the reclamation laws or contracts entered pursuant to those laws, this Court's decisions do not create "an absolute requirement that Congress expressly reserve in the controlling statute the right to amend the statute or governmental contracts entered under it." Pet. App. A24. Next, noting that the contracts themselves make no mention whatsoever of leasing, the court rejected petitioners' assertions that the contractual limitations upon the delivery of water to lands in excess ownership were intended to be the exclusive restrictions based upon the size of the individual water users' operations and, hence, create an implied contractual right to be free of any restrictions concerning the use of water upon leased lands. The court found that construction of the contracts unacceptable in light of the reclamation laws' statutory goal of promoting moderate-sized family farms and in view of the principle, as stated by this Court in *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52-53 (1986), that government contracts "should be construed, if possible, to avoid foreclosing exercise of sovereign authority." Pet. App. A24-A34. For similar reasons, the court ruled that petitioners' "investment-backed expectations" stemming from the absence of any previous federal regulation concerning leasing did not give rise to constitutionally protected rights. *Id.* at A34-A36.

Having thus found that petitioners "have no vested property right to buy reclamation water for delivery to leased lands" (Pet. App. A36), the court concluded that Section 203(b) does not offend the Due Process Clause nor does it effect a taking within the meaning of the Fifth Amendment (Pet. App. A36). The court

further held that "the Reclamation Reform Act is rationally related to a legitimate governmental purpose" because the Act and its legislative history show that "Congress's primary concerns were not with the federal budget, but rather, with the promotion of small farming operations, equitable distribution of water under modern farming conditions, and water conservation." *Id.* at A36-A37.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The questions presented in this case, which involve the scope of a subsidy enjoyed by a discrete number of geographically concentrated agricultural entities, do not raise an issue of national importance. Accordingly, further review is not warranted.

1. Petitioners contend that their water service contracts confer a vested right to utilize water at the fixed contract price upon an unrestricted amount of leased lands and that Section 203(b) abrogates this contractual right in violation of the Due Process Clause. As the court of appeals explained, however, the contracts are entirely silent concerning leasing. The water service contracts do not surrender Congress's power to act with respect to the sale of subsidized water from federal reclamation projects for use on leased lands.

a. This Court has held in cases involving governmental contracts that "contracts should be construed, if possible, to avoid foreclosing exercise of sovereign authority." *Public Agencies*, 477 U.S. at 52-53. It has rejected the claim that a " 'sovereign forever waives the right to exercise one of its sovereign

powers unless it expressly reserves the right to exercise that power in' the contract." *Id.* at 52 (quoting *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982)). Instead, any surrender of governmental regulatory authority through contract must be expressed in "clear and unmistakable" terms. *Merrion*, 455 U.S. at 148. Here, the contracts at issue contain no express surrender of regulatory authority with regard to leased lands—indeed, they contain no mention of leasing. Accordingly, the contracts do not by their terms surrender Congress's constitutional authority to restrict the use of federal project water on leased lands.

As the court of appeals recognized (Pet. App. A27-A30), this Court, in *FHA* v. *The Darlington, Inc.*, 358 U.S. 84 (1958), rejected an argument similar to that advanced by petitioners here. In *Darlington*, Congress enacted a mortgage insurance program with the aim of providing housing for veterans and their families. A corporation entered into a federal contract to obtain mortgage insurance, constructed an apartment house, and then rented some furnished apartments to transients—a use not expressly prohibited by the governing statute or agency regulations. Thereafter, in 1954, Congress enacted legislation expressly barring the rental of such housing units to transients. The corporation sued, asserting that the 1954 Amendment effected an unconstitutional infringement of its contractual rights. This Court ruled, however, that the plaintiff's expectation to continue to rent units to transients was "one that lies in the periphery where vested rights do not attach." *Id.* at 90. The Court noted that the 1954 Amendment applied prospectively only and that the corporation was not being penalized for anything it had done in the past. *Id.* at 91. The Court explained:

> The Constitution is concerned with practical, substantial rights, not with those that are unclear and gain hold by subtle and involved reasoning. Congress by the 1954 Act was doing no more than protecting the regulatory system which it had designed. Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.

Ibid.

The Court's decision in *Darlington* is directly applicable here. Congress has acted prospectively to prevent the continuation of leasing practices that circumvent the intent, if not the letter, of federal reclamation law. Congress obviously may take action to prevent parties from manipulating a federal program to direct a federal subsidy from its intended beneficiaries to a select few. Petitioners' contracts contain no language waiving the government's authority to regulate leasing practices, and the court of appeals correctly declined to read any such implied waiver into those contracts. See *Thorpe* v. *Housing Auth.*, 393 U.S. 268, 278-281 (1969); *American Hosp. Ass'n* v. *Schweiker*, 721 F.2d 170, 182-184 (7th Cir. 1983), cert. denied, 466 U.S. 958 (1984).

Petitioners contend (Pet. 6-8, 11) that because the water service contracts incorporate the excess land ownership requirements as they existed prior to 1982 and contain an article stating that the United States agrees, at the option of the districts, to negotiate contract amendments in the event that Congress repeals or amends those statutory excess land provisions, the contracts must be read as a surrender of the government's authority to regulate leasing. This contention

is unfounded. As petitioners themselves point out (Pet. 11), the excess land provisions incorporated into the contracts are framed exclusively in terms of land *ownership*. Section 203(b), however, does nothing to affect water deliveries on the basis of land ownership. To be sure, a landowner in the petitioner water districts may no longer *lease* lands in excess of 160 acres and receive water for such lands at the pre-1982 price. The contracts, however, contain no reference to the government's regulatory authority over the extent of leasing—they speak solely in terms of land ownership. Hence, the contracts fall far short of overcoming the presumption that contracts will be construed, if possible, to avoid foreclosing the exercise of sovereign authority.

Petitioners also assert (Pet. 12) that Section 203(b) is an abrogation of their contractual rights because the water service contracts provide for the delivery of water at a fixed maximum price and Section 203(b) requires that the United States be paid at a rate greater than the fixed contractual price for water used on leased lands in excess of 160 irrigable acres. Under its retained regulatory authority to further the essential purposes of the pre-1982 federal reclamation laws, however, the government could have precluded altogether the use of federal reclamation project water on land leased in landholdings in excess of 160 acres. Accordingly, the petitioners cannot justifiably complain that Congress decided to take the less drastic remedial measure of allowing water users to elect to utilize reclamation water on such leased lands, but at a price that reduces the amount of the federal subsidy with respect to such lands.

In summary, Congress retained the authority to regulate the use of water from federal irrigation

projects. "It is hardly lack of due process for the Government to regulate that which it subsidizes." *Ivanhoe*, 357 U.S. at 296 (quoting *Wickard v. Filburn*, 317 U.S. 111, 131 (1942)). The water service contracts do not mention leasing. Hence, they cannot reasonably be construed as a "clear and unmistakable" surrender, *Merrion*, 455 U.S. at 148, of the government's regulatory authority to insure the wide distribution of the reclamation subsidy by limiting the amount of lands receiving subsidized water that a single landholding entity may lease. Accordingly, petitioners do not have a vested right protected by the Due Process Clause with regard to leased lands.

b. Even if the contracts could be construed as conferring a right to the delivery of subsidized water to leased tracts of any size, Section 203(b) would nonetheless pass constitutional scrutiny. The Contract Clause of the United States Constitution does not apply to the actions of the federal government. *Pension Benefit Guaranty Corp.* v. *R. A. Gray & Co.*, 467 U.S. 717, 732 n.9 (1984). Rather, federal legislation affecting contracts is measured under the "less searching standards" of the Due Process Clause of the Fifth Amendment. *Id.* at 733. Indeed, even if a contractual impairment has been established, the courts will weigh the competing interests and may uphold a contractual impairment as outweighed by the public interest. "As with laws impairing the obligations of private contracts, an impairment [of a government contract] may be constitutional if it is reasonable and necessary to serve an important public purpose." *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 25 (1977). A principal concern in such a balancing analysis is the degree to which the challenged legislation is "purely financial" in effect,

rather than serving broader social purposes. *Id.* at 24-25.

Contrary to petitioners' assertions (Pet. 17-18), the Reclamation Reform Act in general, and Section 203(b) in particular, were not enacted for purely financial reasons. As this Court stated in *Ivanhoe*, "[f]rom the beginning of the federal reclamation program in 1902, the policy as declared by the Congress has been one requiring that the benefits therefrom be made available to the largest number of people, consistent, of course, with the public good." 357 U.S. at 292. The Reclamation Reform Act, including Section 203(b), was passed to further this policy in light of present realities.

The text of the Reclamation Reform Act, and its legislative history, demonstrate that Congress's primary concern was not the *amount* of the federal subsidy but, rather, its equitable *distribution* under modern-day conditions. This is perhaps best demonstrated by the new pricing provisions set out in Section 205 of the Act. Under those provisions, a qualified recipient may now obtain irrigation water for landholdings (owned, leased, or a combination of the two) of up to 960 acres at a price that still does not include any element of interest on construction costs and that, as based upon the pre-1982 law concerning return of allocated construction costs, will often fail to cover more than a fraction of the government's original construction costs. This provision thus closes the leasing loophole while retaining all of the construction cost subsidy elements of the pre-1982 reclamation law. Its primary thrust, accordingly, is to assure equitable distribution of the subsidy.

Similarly, the legislative history of the RRA indicates that Congress's essential concern was to assure equitable distribution of the subsidy under the con-

ditions now facing the agricultural sector, rather than simply to reduce costs. See H.R. Rep. No. 458, 97th Cong., 2d Sess. 10 (1982) (Pet. App. H4-H5); H.R. Conf. Rep. No. 855, 97th Cong., 2d Sess. 30 (1982) (Pet. App. H28-H29). Notably, the proponents of the bill did not frame their objections to the former leasing practices principally in terms of costs to the government. Rather, their primary concern was that equitable distribution of the subsidy was being frustrated through unrestricted leasing. See 128 Cong. Rec. 26,079 (1982) (Rep. Kazen).

As with the RRA in general, so with Section 203 (b) in particular. Contrary to petitioners' contention, the primary purpose of that provision is not to enrich the federal treasury. Rather, when viewed in the context of the entire Reclamation Reform Act and the federal reclamation laws of which it is a part, it is apparent that the overriding purpose of Section 203(b) is to assure fidelity to the longstanding federal objective of directing the delivery of federally subsidized water to smaller scale farming operations. To be sure, Congress could have adopter the more direct approach of simply prohibiting the delivery of federal project irrigation water to leased lands operated in units in excess of 160 irrigable acres and thus eliminated any colorable argument that Congress's motives were wholly financial. Congress, however, should not be faulted because, instead of wholly cutting off water deliveries to such lands, it elected to pursue the less drastic course of allowing water deliveries to continue but at a price that eliminates (or at least substantially diminishes) the federal subsidy.

In summary, even if Section 203(b) could be construed as an impairment of petitioners' contractual rights, that impairment would survive Due Process

Clause scrutiny because it is a reasonable and necessary measure enacted to serve an important public purpose. That important public purpose is to insure that the fundamental objective of a wide distribution of the reclamation subsidy is no longer undercut by large-scale leasing of lands benefitting from subsidized water.

2. For the same reasons that the water service contracts do not confer a vested property ri ht protected by the Due Process Clause, they likewise do not create any property right protected by the Just Compensation Clause of the Fifth Amendment. As discussed above, the contracts do not surrender Congress's regulatory authority to govern the use of federal project water on leased lands. Hence, Section 203(b) does not effect any taking of petitioners' property rights.

Petitioners' reliance upon *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979), is misplaced. In *Kaiser Aetna*, the landowner held fee title to a pond. The Court held that the landowner's fee title included the right to exclude the public because that right is "universally held to be a fundamental element of the property right." *Id.* at 179-180.[9] Here, by contrast,

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[9] The landowner, with the knowledge of the Corps of Engineers, dredged a channel connecting the pond with a bay that opened on the Pacific Ocean. The government later asserted that the landowner had relinquished its right to exclude the public from the pond when it dredged the channel connecting it with public waters. This Court rejected that position, stating that "while Kuapa Pond may be subject to regulation by the Corps of Engineers, acting under the authority delegated it by Congress in the Rivers and Harbors Appropriation Act, it does not follow that the pond is also subject to a public right of access." 444 U.S. at 172-173. This Court concluded that the claimed right of public access, which

the asserted contractual claim to purchase subsidized water from a federal reclamation project for use on leased-lands operations of unlimited size is far different from the "fundamental element" of the *Kaiser Aetna* landowner's property right to exclude the public from its private property. As we have explained, the right to obtain subsidized water from a federal reclamation project has been subject to conditions and restrictions from the inception of the federal reclamation program. In enacting Section 203 (b), Congress was exercising its "ordinary regulat[ory]" function (444 U.S. at 178) of ensuring attainment of the fundamental goals of the federal reclamation program, which goals include an equitable distribution of the benefits of the program among the recipients.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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would "result in an actual physical invasion of the privately owned marina," *id.* at 180, "goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking." *Id.* at 178.

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